NOTICE:

THE FOLLOWING MOTION TO FILE AN AMICUS BRIEF OUT-OF-TIME WAS DENIED BY THE COURT ON OCTOBER 31, 1983 (52 LW 3341), BUT IS REPRODUCED HEREIN IN THE INTEREST OF COMPLETENESS.

No. 82-958

IN THE

Supreme Court of the United States

October Term, 1982

McDONOUGH POWER EQUIPMENT, INC.,
Petitioner,

v.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD; JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION BY SHEILA BREWER FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE UPON THE CONSENT OF THE PARTIES AND BRIEF OF AMICUS CURIAE SHEILA BREWER

IN SUPPORT OF REVERSAL

STEVEN L. TUCKER
Jones, Gallegos, Snead & Wertheim, P.A.
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MOTION BY SHEILA BREWER FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE UPON THE CONSENT OF THE PARTIES

SHEILA BREWER, by and through her attorneys, JONES, GALLEGOS, SNEAD & WERTHEIM, P.A., hereby moves for leave to file a brief as *amicus curiae* in this cause and as grounds for this Motion states:

1. Petitioner McDonough Power Equipment, Inc. and respondents Billy G. Greenwood, etc., et al., have filed their written consent to this Motion and to the filing of the Brief of *amicus curiae* Sheila Brewer.

2. This Court has received a Brief filed by *amicus curiae* Southern Union Company in support of the respondents.

3. The interest of *amicus curiae* Southern Union Company (hereinafter "Southern Union"), as stated in its Brief, is that of a defendant in several consolidated actions currently pending in the District Court of Colorado styled *In Re New Mexico Natural Gas Antitrust Litigation*, MDL Docket No. 403 (Southern Union's Brief, pp. 1-2). One of those proceedings is *Sheila Brewer, et al. v. Southern Union Company, et al.*, CIV 79-578 HB, a class action brought on behalf of all residential gas customers of Southern Union Company in the State of New Mexico. (*Id.* at 2).

4. In further explanation of its interest in this proceeding, Southern Union stated in its Brief that, after the jury had returned a liability verdict against Southern Union in the above-referenced consolidated proceedings, it was determined that one of the jurors had three children who were members of the certified class, namely, "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976, and February 28, 1981." (*Id.* at 2). That information was contrary to a response by that juror in a jury questionnaire submitted to prospective jurors prior to trial. Southern Union moved for a new trial based upon that discrepancy. Plaintiffs sought but were denied an evidentiary hearing on the issue of the juror's actual bias and, specifically, on the issue of whether that juror's response was knowingly false. Based upon *Greenwood v. McDonough Power Equipment Co., Inc.*, 687 F.2d 338 (10th Cir. 1982), the trial court granted defendants' Motion for New Trial without an evidentiary hearing. A subsequent deposition of the juror contained substantial evidence that the juror did not know that any of his children were customers of Southern Union until after the verdict had been returned. (*See*, Appendix II).

5. The interests of *amicus curiae* Sheila Brewer are at least as great as those of *amicus curiae* Southern Union Company in the proper resolution of this proceeding.

6. Neither Sheila Brewer nor her counsel was given notice that Southern Union Company had sought or was granted consent to file a brief as *amicus curiae* until September 24, 1983, when counsel first learned that such a brief had been filed. Counsel for Brewer has proceeded as expeditiously as possible thereafter to file this Motion.

7. *Amicus curiae* Sheila Brewer respectfully submits that this Motion should be granted (1) to insure a balanced presentation of the facts and issues in *Brewer, et al. v. Southern Union Company, et al., supra,* to the extent Southern Union's discussion of that case may have some bearing on this one and (2) otherwise to assist the Court in the resolution of the case before it.

Respectfully submitted,

JONES, GALLEGOS, SNEAD &
WERTHEIM, P.A.
Attorneys for Amicus Curiae
Sheila Brewer

By_____
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CERTIFICATE OF SERVICE

I certify that 3 true copies of the foregoing Motion by Sheila Brewer For Leave to File a Brief as Amicus Curiae Upon Consent of the Parties and Brief of Amicus Curiae Sheila Brewer have been mailed, by first-class mail, postage prepaid, to Donald Patterson, Esq., Attorney for Petitioner, 520 First National Bank Tower, Topeka, Kansas 66603; Dan L. Wulz, Esq., Attorney for Respondents, 115 East Seventh Street, Topeka, Kansas 66603; and to Jerry L. Beane, Esq., Attorney for Southern Union Company, 1200 One Main Place, Dallas, Texas 75202, on this 10th day of October, 1983.

STEVEN L. TUCKER

APPENDIX I

No. 82-958

IN THE

Supreme Court of the United States

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McDONOUGH POWER EQUIPMENT, INC.,
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BRIEF OF AMICUS CURIAE SHEILA BREWER

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE SHEILA BREWER

I.

STATEMENT OF INTEREST

Amicus curiae Sheila Brewer files this brief to support the proposition that a new trial based upon alleged juror bias cannot be granted without an evidentiary hearing on the issue of the jurors actual bias and a supported finding of actual bias. Insofar as this position is at least an alternative position urged by all parties to this case, *amicus curiae* Sheila Brewer supports petitioner and respondents.

The interest of *amicus curiae* Sheila Brewer arises from her status as plaintiff in an antitrust class action currently pending in the United States District Court of the District of Colorado styled *Brewer, et al. v. Southern Union Company, et al.*, CIV 79-578 HB (hereinafter "the Brewer case"). The certified class in the *Brewer* case is defined as "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976 and February 28, 1981." The class consists of approximately 280,000 individuals.

The *Brewer* case was consolidated by the Judicial Panel for Multidistrict Litigation with a similar lawsuit filed by fourteen agencies and universities of the State of New Mexico, a similar lawsuit filed by the major electric utility in New Mexico, and a similar lawsuit by some farmers in New Mexico and Texas. (The farmers' suit was later settled). The consolidated proceedings are styled *In Re New Mexico Natural Gas Antitrust Litigation*, MDL Docket No. 403. Estimated *single* damages sought by all plaintiffs exceeds $191 million, which would be trebled in the event of a judgment in their favor. Prior to trial, two of the five defendants settled for a combined total of approximately $11 million.

Trial as to the remaining three defendants was bifurcated as to liability and damages. As Southern Union correctly stated:

> Because many potential jurors were either class members or closely related to class members, the trial court and counsel made extraordinary efforts to ensure that neither group served as jurors.

Brief of Amicus Curiae Southern Union Company, p.2.

Trial was moved to Las Cruces, New Mexico and the jury was drawn from that area of the state because Southern Union is not the primary natural gas utility in that region. Prior to being called for jury duty, a juror questionnaire was sent to numerous prospective jurors in an effort to identify, among other things,

potential jurors who were customers or related to customers of Southern Union. *Voire dire* was also conducted on this issue, a jury was ultimately selected and trial began.

After seven weeks of trial in February and March of 1982, the jury returned a verdict in favor of plaintiffs. Shortly thereafter, Southern Union came forward with evidence that three of its customers were the children of one of the jurors, Dan Virden. Juror Virden had answered "no" to the juror questionnaire inquiring as to whether he had any relatives who were customers of Southern Union. He had also remained silent during *voir dire* when a similar question was asked.

With this evidence, Southern Union moved for a new trial in all of the consolidated proceedings on the grounds of juror bias. Plaintiffs sought an evidentiary hearing on the issue. The trial court denied plaintiffs' request for an evidentiary hearing and granted the motion for new trial in all of the consolidated cases, based heavily on the recent opinion of the Tenth Circuit in *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982). Thereafter, the case was assigned to the District of Colorado and to another judge, for reasons unrelated to this issue.

Juror Virden was later deposed by all parties under the supervision of a retired state judge. The substance of his testimony was that he did not know any of his children were ever customers of Southern Union.[1] All of the three children in

[1] Excerpts from the deposition of juror Virden are reprinted and contained in Appendix II, *infra*. The entire deposition was not included because of its length. Southern Union would undoubtedly emphasize testimony not included in this excerpt to argue that this juror had constructive knowledge of his children's status or perhaps that actual knowledge could be inferred. The only purpose of including any of the deposition, however, is to demonstrate the need for an evidentiary hearing.

question were grown, had married, lived away from home and were ". . . on their own and making their own life." (App. II at II-10). The juror's answer to the questionnaire, although later proven erroneous, was based upon his own understanding. "As far as I knew at the time, that's the way it was." (App. II at II-7).

After new trial had been granted, two of the remaining defendants entered into settlement agreements with the plaintiffs, which are pending court approval. The combined settlements are for approximately $52 million. The consolidated cases are awaiting a new trial against the remaining defendant, Southern Union Company.

In these consolidated cases, a juror error on a questionnaire automatically nullified a seven-week trial, resulted in a two-year delay, resulted in plaintiffs having to compromise by millions of dollars what would otherwise have been an adjudicated claim, and voided a finding of liability against all defendants. This result obtained without any evidence of actual bias on the part of that juror and, in fact, despite later-discovered evidence that the juror had no actual bias.

Because the original verdict against the remaining defendant could be reinstated and a new trial avoided, depending upon the Court's disposition of the *McDonough Power* case, *amicus curiae* Sheila Brewer respectfully moves for leave to file this brief.

II.

SUMMARY OF ARGUMENT

A. Only last year, the Court held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, ___U.S.___, 102 S.Ct. 940, 945 (1982). That decision, together with the previous decisions of the Court discussed therein, makes clear that a verdict will not be set aside for alleged juror bias unless and until actual bias is established in an evidentiary hearing. The lower court in this case has articulated a new formula which is irreconcilable with the decisions of this Court. The Tenth Circuit has transformed the issue of actual bias into a legal issue divorced from any evidence of the juror's actual knowledge, intent, or state of mind. Accordingly, the judgment of the lower court must be reversed.

B. An erroneous failure to respond or an erroneous response by a juror does not necessarily or universally conceal a biased mind. For example, a juror may not know that a particular answer was false; one cannot be biased due to a condition or relationship of which one has no knowledge. Yet the judgment of the lower court would presume bias and require a new trial regardless of the juror's actual knowledge. This point is illustrated by the application of the Tenth Circuit's opinion in the *Greenwood* case to the *Brewer* case, in which *amicus curiae* Southern Union and Sheila Brewer are parties. Aside from lack of knowledge, other evidence may demonstrate that a juror was not biased, despite an omitted or erroneous answer. Accordingly, bias should not be the subject of an irrebuttable presumption. Moreover, an evidentiary hearing is not only available as an alternative means for making the determination of bias, it is the proper procedure for challenging juror bias. The question of bias is a question of fact and, particularly when the validity of a prior trial hangs in the

balance, the parties are entitled to the opportunity to adduce evidence on the issue before a new trial may be granted.

III.

ARGUMENT

A. The Remedy for Alleged Juror Bias is an Evidentiary Hearing on the Issue of Actual Bias.

The issues presented in this case have already been decided by the Court, most recently in *Smith v. Phillips*, ___U.S.___, 102 S.Ct. 940 (1982). In that case a defendant in a criminal case was convicted in state court after a jury trial. Defendant later moved to vacate the conviction on the grounds that one of the jurors failed to disclose that he had applied for a position with the District Attorney's office. An evidentiary hearing was held in state court, after which the judge found that the juror was not biased. Defendant then sought habeas corpus relief in federal court. The federal district court did not disagree with the findings of the state court nor did it find evidence of actual bias. However, the federal district court imputed bias to the juror because "the average man in [the juror's] position would believe that the verdict of the jury would directly affect the evaluation of his job application." *Id.* at 944. The appellate court affirmed, on a different ground, and this Court reversed.

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

Id. at 945.

The Court then reviewed its prior decisions rejecting an imputation of bias and reaffirming the requirement of establishing actual bias at an evidentiary hearing. *Chandler v. Florida*, 449 U.S. 560 (1981); *Remmer v. United States*, 347 U.S. 227 (1954); *Frazier v. United States*, 335 U.S. 497 (1948); *United States v. Wood*, 299 U.S. 123 (1936).

> The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.

Smith v. Phillips, supra, 102 S.Ct. at 946. (Footnote omitted).

Unless a criminal defendant has lesser right to a fair trial than a civil litigant, then the decision in *Smith v. Phillips, supra,* and the decisions upon which it relies control this case. In a challenge of a jury's determination on the grounds of juror bias, the test is *actual bias* on the part of the juror in question and the burden is on the moving party to establish *actual bias.*

> While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as demonstrable reality.

Beck v. Washington, 369 U.S. 541, 558 (1962).

The judgment of the Tenth Circuit in *Greenwood v. McDonough Power Equipment Co., Inc.,* 687 F.2d 338 (10th Cir. 1982), cannot be reconciled with the prior decisions of this Court. It replaces the actual bias standard with an "objective" test applicable to the "average juror." It expressly holds that the juror's actual state of mind is irrelevant. It forecloses the evidentiary hearing on the issue of bias which is precisely

the procedure which this Court has held to be the appropriate remedy where juror bias is alleged. Accordingly, it must be reversed.

B. An Irrebuttable Presumption of Bias from a Juror's Response or Failure to Respond to a Question Is Unjustifiable Because the Means for Establishing Actual Bias, *Vel Non*, Is An Evidentiary Hearing.

The rule announced by the Tenth Circuit in the opinion below is commendable in its simplicity but disastrous in its effect. Reduced to its basic terms, that rule is that a losing litigant automatically gets a new trial whenever he can show, after trial, that a juror failed to disclose significant information upon request or gave incorrect information. Without more, the court held, probable bias is established. Information is deemed significant if it is of "sufficient cogency and significance" to cause "us" to believe that the losing party "was entitled to know of it" when he exercised his peremptory challenge. *Greenwood v. McDonough Power Equipment, Inc., supra,* at 342. Although the Court called this an objective test, it appears to rest entirely upon the subjective opinion of the court as to what is significant.

Missing from the formula established below is the only element that counts: evidence of actual bias on the part of the juror. *Smith v. Phillips, supra.* The court below replaced the actual bias standard with an irrebuttable presumption of bias based not upon the juror's state of mind but solely upon a failure to respond or an erroneous response by the juror.

Irrebuttable presumptions which affect rights protected by the due process clause of the United States Constitution "have long been disfavored." *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 645 (1974), quoting from *Vlandis v. Kline,* 412 U.S. 441, 446 (1973). Such a presumption "is forbidden . . . when that presumption is not necessarily or

universally true in fact and when the State has reasonable alternative means of making the crucial determination." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 645 (1974).

It is not necessarily nor universally true that a juror who fails to disclose or erroneously discloses important information is, in fact, biased. For example, a juror cannot be biased by a fact of which he has no actual knowledge. *See, United States v. Brooks*, 677 F.2d 907 (D.C.Cir. 1982); *Jackson v. United States*, 408 F.2d 306 (9th Cir. 1969). This point is well-illustrated by the *Brewer* case, in which *amici curiae* before this court are parties. That is a class action on behalf of approximately 280,000 residential customers of Southern Union, a natural gas utility. The trial of the case was moved to Las Cruces, New Mexico, and the jurors were drawn from that region of the state for the express reason that Southern Union is not the primary gas utility in that area. After a seven-week jury trial on the issue of liability, a verdict in favor of plaintiffs was nullified because one of the jurors, Dan Virden, was unaware of, and therefore failed to accurately disclose, the fact that two of his sons and one daughter had, at some time between June 30, 1976 and February 28, 1981, been customers of Southern Union.[2] Dan Virden lived in a rural area and was not only not a customer of Southern Union, he used butane, not natural gas. (App. II at II-3, II-10). None of those three children (Richard, Lynn, and Roy) lived with their father. (App. II at II-6). All of them were grown and had married. (App. II at II-4, II-6). As Mr. Virden testified, "the kids all went on their own, and I just – they weren't in my mind. I didn't think about who was getting gas or electricity or water or something else. They was [sic] on their own and making their own life." (App. II at II-10).

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[2] Excerpts from the deposition of Dan Virden are attached as Appendix II.

When Dan Virden responded in a juror questionnaire that he had no relatives who were customers of Southern Union during the relevant time period, he simply did not know otherwise. (App. II at II-9). After the verdict was returned against them, Southern Union came forward with evidence that three of its customers were his children and obtained an automatic new trial with that information, based upon the *Greenwood* case. The fact of the juror's lack of knowledge did not come to light until after the court had denied plaintiffs an evidentiary hearing and had granted a new trial.

Aside from lack of knowledge, a failure to properly respond could be based upon a juror's misunderstanding of the question. For example, suppose the term "relatives" is not defined in a question on that subject and a juror assumes that a distant cousin was not included. Under the *Greenwood* rule, the losing party gets a new trial if the court believes that the "average juror" would have thought cousins were included in that question. A "misunderstanding of the voir dire question, does not foreclose the conclusion that the right to peremptory challenge was substantially impaired." *Greenwood, supra,* at 343. The juror's relationship with the cousin may or may not establish actual bias but it does not "necessarily or universally" do so such that no further inquiry is necessary. *See, United States v. Sockel,* 478 F.2d 1134 (8th Cir. 1973); *United States v. Robbins,* 500 F.2d 650 (5th Cir. 1974); *Brown v. United States,* 356 F.2d 230 (10th Cir. 1966); *United States v. Wander,* 465 F.Supp. 1013 (W.D.Pa. 1979), *appeal dismissed as moot,* 601 F.2d 1251 (3rd Cir. 1979).

Suppose a juror suddenly remembered that he or she failed to arrange to have a child picked up from school and, as a result of briefly worrying about that, failed to respond to a question on *voir dire* with a correct answer. This, too, would give the losing party an automatic new trial under the *Greenwood* rule because the failure to respond accurately establishes an irrebuttable presumption of bias. The possibilities are endless.

"Impartiality is not a technical conception. It is a state of mind." *United States v. Wood*, 299 U.S. 123, 145-146. An inaccurate or omitted response does not "necessarily or universally" cloak an actual bias.

Moreover, there is clearly another means available for determining bias other than an irrebuttable presumption. The rule followed in most circuits is that actual bias must be demonstrated in a post-trial evidentiary hearing. *See, United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979); *United States v. Mulligan*, 573 F.2d 775, 777-778 (2nd Cir. 1978); *United States v. Wander*, 465 F.Supp. 1013 (W.D.Pa. 1979), *appeal dismissed as moot*, 601 F.2d 1251 (3d Cir. 1979); *United States v. Billings*, 692 F.2d 320, 325 (4th Cir. 1982); *Vezina v. Therist Marine Service, Inc.*, 554 F.2d 654, 656 (5th Cir. 1977), *after remand*, 610 F.2d 251, 252 (5th Cir. 1980); *McCoy v. Goldston*, 652 F.2d 654, 658 (6th Cir. 1981); *United States v. Currie*, 609 F.2d 1193 (6th Cir. 1979); *Christian v. Hertz Corporation*, 313 F.2d 174, 175 (7th Cir. 1963); *United States v. Sockel*, 478 F.2d 1134 (8th Cir. 1973); *De Rosier v. United States*, 407 F.2d 959, 963 (8th Cir. 1969); *Jackson v. United States*, 408 F.2d 306 (9th Cir. 1969); *Rogers v. McMullen*, 673 F.2d 1185, 1190 (11th Cir. 1982); *United States v. Brooks*, 677 F.2d 907 (D.C. Cir. 1982).

As demonstrated by the hypothetical situations just discussed, an evidentiary hearing allows the court and the parties to probe into the circumstances surrounding the juror's response or lack of response to a question. That type of inquiry is essential to a fair determination of the issue. Because "reasonable alternative means are available for making the crucial determination," an irrebuttable presumption of bias is unwarranted. Just because the Tenth Circuit's approach may be "easier" does not make it constitutionally acceptable. *Cleveland Board of Education v. LaFleur, supra* at 648. Moreover, while it may appear to conserve judicial resources in the short

run, its ultimate effect is surely to multiply dramatically the number of new trials. When a new trial is the automatic result, the losing party will now be encouraged to comb through jurors' backgrounds after trial to find some discrepancy on some item which counsel was "entitled to know." It is not only arbitrary and destructive of a party's right to the benefits of a fair trial, it substantially impairs the trial process itself.

The following quotation from *United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979), perceptively summarizes the position of *amicus curiae* Sheila Brewer on this issue:

> We do not treat lightly the concealment of information by a prospective juror, but the jury system, despite its vital role in our jurisprudence, is not perfect. It is based on the assumption that a person's guilt or innocence can best be determined by twelve persons representing a fair cross section of the community. We try to eliminate bias and prejudice by juror questionnaires and voir dire examination. There is no way, however, of absolutely insuring that a prospective juror will answer honestly the questions put to him. The secrecy within which juror's deliberations are necessarily cloaked prevents us, in most cases from ever finding out the reasons and motivations for a verdict. When an individual betrays his trust, the only recourse is to try to determine, as was done here, whether there was such a showing of bias or prejudice as to require a new trial. This protects, insofar as is humanly possible, the integrity of the jury trial. A new trial would be a windfall for a defendant but it would have no prophylactic or deterrent effect on prospective jurors.

CONCLUSION

The trial court in this case did not go far enough. Once the issue of a possibly inaccurate response from a juror had been raised, an informal telephone conference between the

juror and counsel was permitted, but the Motion for New Trial was denied without an evidentiary hearing or even without the results of the telephone conference being reported to the court. On the other hand, the Court of Appeals went too far. It granted a new trial based solely upon its view of the unreported telephone conference and the significance of the information withheld, and held irrelevant all possible explanations for the juror's failure to respond.

This Court should reverse the judgment of the Tenth Circuit Court of Appeals with instructions to reverse the judgment of the trial court and to remand this cause to the trial court for an evidentiary hearing on plaintiffs' motion for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that 3 true copies of the foregoing Brief of Amicus Curiae Sheila Brewer have been mailed, by first-class mail, postage prepaid, to Donald Patterson, Esq., Attorney for Petitioner, 520 First National Bank Tower, Topeka, Kansas 66603; Dan L. Wulz, Esq., Attorney for Respondents, 115 East Seventh Street, Topeka, Kansas 66603; and to Jerry L. Beane, Esq., Attorney for Southern Union Company, 1200 One Main Place, Dallas, Texas 75202, on this 10th day of October, 1983.

STEVEN L. TUCKER

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN RE NEW MEXICO NATURAL GAS ANTITRUST LITIGATION	No. MDL 403 (Dist. of N.M.)

DEPOSITION OF DAN EUGENE VIRDEN
SEPTEMBER 8, 1983

The deposition of DAN EUGENE VIRDEN was taken on behalf of the Plaintiffs at 9:00 a.m., Thursday, September 8, 1983, before DEBORAH O'BINE, Certified Shorthand Reporter of the firm of Santa Fe Deposition Service, 417 East Palace Avenue, Santa Fe, New Mexico, taken at the Conference Room at the office of Otero Savings & Loan Association, 723 New York Avenue, Alamogordo, New Mexico.

APPEARANCES

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FOR THE PLAINTIFF PUBLIC SERVICE COMPANY: RUSSELL MOORE, ESQ.
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Also present: THE HONORABLE FRANK B. ZINN
1805 Salinas Drive
Las Cruces, New Mexico

Page

4 **DAN EUGENE VIRDEN**

The witness herein, after having
been first duly sworn upon his oath,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALLEGOS:

Q Would you please state your full name?

A Dan Eugene Virden.

Q Where do you live, Mr. Virden?

A I live east of Tularosa, New Mexico.

* * *

Q That's in a rural area outside of Tularosa, New Mexico?

A Yes.

5 Q Where did you live prior to that?

A I lived in High Rolls, New Mexico.

Q Would you describe where High Rolls is?

A It's probably 15 miles east of Alamogordo, is where I lived. At that time the box number was Box 83, High Rolls. I lived there for about 18 years, 20 years or something.

Q High Rolls is a small mountain community east of Alamogordo; is that correct?

A That's correct.

* * *

8 Q Are you married, Mr. Virden?

A Yes.

Q What is your wife's name?

A Bobbie Virden, B-o-b-b-i-e.

Q Have there been any children born to the marriage of you and Bobbie Virden?

A Yes. I have five.

Q What are their names, if you would give us that information, beginning with the oldest child?

A Richard Virden, Lynn Virden –

Q That's a lady?

A A girl, right, daughter. And Roy Virden, Russell Virden, and Robbie Virden.

Q What is the age of Richard Virden?

A Twenty-nine.

Q Where does he live presently?

A He lives north of Alamogordo.

Q On a ranch or farm?

A Well, it's about halfway between Tularosa and Alamo in a subdivision, rural area.

Q What is his occupation?

A He's Sheriff of Otero County.

Q As of the time period beginning in December of 1981 and ending in early February 1982, where did Richard Virden live, if you know?

A I think he lived there. He's been married ten years. He lived out there.

Q Where does Lynn Virden live?

A She lives west of La Luz, which is north of Alamogordo also.

Q That's a rural area?

A A rural area, right.

Q Is she married?

A Yes, to Brian Burkes.

Q How long have they been married?

A About ten years also.

Q How long have they lived west of La Luz?

A I don't know. They lived there, and then they went to Las Cruces, and she got her degree, and then they moved back there.

Q So beginning with her marriage to Brian Burkes, they lived in that area around La Luz?

A Right.

Q Then spent some time in Las Cruces?

A Right.

Q And then back to that location?

A That's right.

Q How old is she?

10 A Twenty-seven.

Q Where does Roy Virden live?

A He lives west of La Luz.

Q A farm, ranch?

A He lives in a trailer park west of La Luz.

Q What is his occupation?

A He's in the United States Air Force.

Q Where is he stationed?

A Holloman, New Mexico.

Q How old is he?

A About twenty-four, twenty-five.

Q What is the age of Russell Virden?

A Twenty-one.

Q Does he live at home?

A No, he lives in Las Cruces. He's going to college over there.

Q And Robbie Virden?

A He lives at home.

Q How old is he?

A Fifteen.

Q I don't believe I asked you how long Roy Virden had lived in that area west of La Luz. Can you tell us that?

A I don't know; a year and a half or two years or something. I don't remember.

11 Q Where did he live before that?

A I'm trying to think if he moved from my apartment up there or not, or he lived someplace else. He got married, and I don't know where all he lived. He was on his own again.

Q About when did he get married?

A He's got a little daughter, two; so it must have been about three years or so ago.

Q Three years, roughly?

A Yes, around '80.

Q About when did Roy Virden discontinue living at home and make his own residence?

A I guess it was about a year after he graduated out of high school; so whenever that was.

Q So that would have been when he was 19; six years ago? Would that be –

A Yes, something like that.

Q Have both Richard and Lynn made their own residence and lived away from home for at least ten years?

A Oh, yes.

* * *

12 Q I'm going to hand you, Mr. Virden, a single sheet that I've marked as Plaintiff's Exhibit No. 1, Virden Depo. And it's entitled: "Questionnaire Regarding Jury Qualifications." Do you recognize that?

A Yes, sir.

Q Does it bear your signature on the line that says "Signature of Prospective Juror"?

A Yes.

* * *

Q Question No. 1, which reads:

"Within the past eight years have you, your spouse or any of your relatives been an employee of or a residential natural gas customer of the Gas Company of New Mexico or
13 Southern Union Company?"

It can be answered "yes" or "no," and the indication is that you answered that "no."

A That's right.

Q That was the way that you meant to answer that at that time?

A As far as I knew at that time, that's the way it was.

Q Did you in December of 1981, when you made the answer to this questionnaire, have any knowledge of the customer status of any of your children? By "customer status," that is, being customers of Gas Company of New Mexico or Southern Union?

A I didn't think about it, or I wouldn't have put "no" if I was aware of it. I don't remember just when the boy lived, for certain, but if I'd thought about it –

Q I'm asking you: What was in your mind at that time, Mr. Virden; not what you might have thought about or found out about or anything.

A At that time it was "no."

Q That was a true answer –

A That's right.

14 Q – based on your knowledge at that time?

A Right.

Q Between the time that you made this questionnaire, which was dated December 11, 1981, and February 2, 1981, [sic] when you were summoned to Las Cruces, was there any other inquiry made of you in any way or form as to your having relatives that were customers of Gas Company?

A No, I don't remember any.

Q After you made this questionnaire, did you mail it back to the United States District Court as you were instructed?

A That's right

Q Your answer is "yes"?

A Yes.

Q Did you give the matter any more thought after that?

A No.

Q What happened next in connection with your being called for service as a juror in the New Mexico Natural Gas Antitrust Litigation?

A I was called over there to Las Cruces to the Federal Court Building and selected at that time to serve on the jury.

Q So the next thing was that you received a summons to
15 appear on a designated date in Las Cruces?

A That's right.

Q When you appeared there, do you recall, sir, that there was a process of questioning of the jurors that went on?

A Right.

Q Judge Bratton was presiding?

A Right.

Q And he asked certain questions? Do you remember that?

A Yes.

Q Do you remember Judge Bratton asking a question to the effect of reminding the prospective jurors of the questions asked on the questionnaire concerning relatives being customers of Southern Union, and asking if any jurors had any different answer or wanted to change their answer; something to that effect?

A No, sir, I don't remember any of the questions the Judge asked.

Q As of that day, and if you will assume with me – I think I'm correct, that was February 2, 1982 – as of that day, did you have any knowledge that any of your children had been customers of Southern Union Gas or its division, its
16 so-called Gas Company of New Mexico?

A No, I didn't think of any of them being customers at all.

Q It wasn't in your mind that any of them were customers?

A No, sir.

Q Was then your answer, if it were put to you in words or substance, as it was in this questionnaire – was your answer then the same as of February 2, 1982; that to your knowledge, you had no relatives who had been or were residential natural gas customers of Southern Union or its division, Gas Company of New Mexico?

A Yes, sir.

* * *

18 Q Once you were selected as a juror in this case, Mr. Virden, as you undertook that service, did you have any knowledge that came to your mind, to your awareness, that somebody who was a relative as defined in this questionnaire was a gas customer of Gas Company of New Mexico?

A No, sir, I didn't – at the time I received this (indicating), and I was served, I didn't think about any of my relatives

being gas customers. The kids all went on their own, and I just – they weren't in my mind. I didn't think about who was getting gas or electricity or water or something else. They was on their own and making their own life. It didn't enter my mind.

Q You say "making their own life." Were the matters of their business affairs solely theirs and not anything that you were involved in?

19 A That's right.

* * *

39 Q Did you understand the document when you read it?

A I did at the time, because I thought at the time – I was thinking about me and the kids. We lived at the ranch east of Tularosa, and I lived in Tularosa, and we lived at High Rolls, and my kids lived with me. And at that time I'd never been a customer of Southern Union or had any connection with Southern Union; none. That's the reason I answered "no" here. That's where I lived. I lived east of Tularosa, where I was raised, and then moved to High Rolls after that, and we used butane there. And we moved east of Tularosa and used butane again. As far as when I filled this out, as far as I knew, that's the reason I put "no," because I've always used butane.